TAN CHIK BIN IBRAHIM v. SAFETY LIFE & GENERAL INSURANCE SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) February 5 & September 13, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 206 of 1985]

Insurance – Motor Insurance – Duty of insurers to satisfy judgment against persons insured by them – Joint tortfeasors – Civil Law Act, 1956, s. 10 (1) and (2) – Road Traffic Ordinance, 1958, s. 80 (1).

Road Traffic – Insurance – "Liability" – Meaning of – Duty of insurers to satisfy judgment – Road Traffic Ordinance, 1958, s. 80 (1).

The appellant in this case was a pillion messenger on a motor vespa owned and ridden by one Abdul Aziz. On March 20, 1976, as a result of an accident between the motor vespa and a motor lorry owned by one Tan Keng Wee and driven by one Ng Pit Fai, the appellant was injured. He sued the three named persons and judgment was given in his favour. The rider of the motor vespa and the driver of the lorry were held to be equally to blame for the accident. He sought to enforce the whole judgment sum against the respondent, the insurer of the motor lorry. The motor vespa was covered by another insurance company which did not cover any pillion rider. The learned trial judge found that the respondent had only insured the owner and driver of the motor lorry but not the rider of the motor vespa. Consequently he held that under section 80 (1) of the Road Traffic Ordinance, 1958, the respondent was only liable to any judgment obtained by a third party in respect of the motor lorry but was not obliged to satisfy the judgment obtained against the rider of the motor vespa as the respondent had at no time covered the latter with any risk in respect of third party liability. He therefore held that the appellant could not enforce that part of the judgment against the respondent. The appellant appealed.

Held, dismissing the appeal: the learned trial judge had correctly considered the implication of section 80 of the Road Traffic Ordinance, 1958, and there was no reason to differ from him in construing section 80 (1) of the Ordinance. Section 80 of the Ordinance should be interpreted subject to section 10(1) and (2) of the Civil Law Act, 1956, in order to bring it into harmony with the development of the law.

Cases referred to:

(1) *Oli Mohamed* v. *Keith Murphy & Anor.* [1969] 2 M.L.J. 244.
(2) *Dingle* v. *Associated Newspapers Ltd & Ors.* [1961] 2 Q B. 162.
(3) *Ahmad Nordin bin Haji Maslan & Anor.* v. *Eng Ngak Hua* [1985] 2 M.L.J. 431.
(4) *Chan Kit Hong & Anor.* v. *Jayakumar & Anor.* [1984] 2 M.L.J. 271.
(5) *Bankers & Traders Insurance Co. Ltd.* v. *National Insurance Co. Ltd.* [1985] 1 M.L.J. 401.
(6) *Austin* v. *Zurich General Accident and Liability Insurance Co. Ltd.* [1945] 1 All E.R. 316.

HIGH COURT.

J.S. Sandu for the plaintiff.
H.R. Sankey for the defendants.

Ajaib Singh J.: On March 20, 1976 the plaintiff who was riding pillion on a motor-vespa owned and ridden by Abdul Aziz bin Ibrahim was injured as a result of an accident between the motor-vespa and a motor lorry owned by Tan Keng Wee and driven by Ng Pit Fei. The plaintiff sued the owner and the driver of the lorry as well as the owner and rider of the motor-vespa in Civil Suit No. 103 of 1977. On June 19, 1982 this civil suit was heard and the court held that the rider of the motor-vespa Abdul Aziz bin Ibrahim and the driver of the lorry Ng Pit Fei were equally to be blamed for the accident. Judgement was accordingly given in favour of the plaintiff against all the three defendants in that suit with liability apportioned at 50 per cent against Tan Keng Wee and Ng Pit Fei the owner and driver respectively of the motor lorry and 50 per cent against Abdul Aziz bin Ibrahim the owner and rider of the motor-vespa.

The plaintiff in the present suit before me claims to enforce the whole of the judgment against the Safety Life & General Insurance Sdn. Bhd. – the defendants in this suit. This insurance company had insured the owner and the driver of the motor lorry against third party risks but not the owner and rider of the motor-vespa Abdul Aziz bin Ibrahim who in fact was covered by another insurance company.

Under section 80(1) of the Road Traffic Ordinance insurers are obliged to satisfy judgments obtained by third parties for damages for the death of or bodily injury to persons in motor accidents involving vehicles which are insured by them against third party risks. In this case the Safety Life & General Insurance Sdn. Bhd. were duty bound to satisfy the judgment to the extent of 50 per cent which the plaintiff had obtained against their own insured namely the owner and driver of the motor lorry but they were not obliged to satisfy the other 50 per cent of the judgment which the plaintiff had obtained against the owner and rider of the motor-vespa Abdul Aziz bin Ibrahim as they had at no time covered him with any risk in respect of third party liability. In the circumstances therefore I held that the plaintiff was in no position to enforce against the defendants that part of the judgment which required the owner and rider of the motor-vespa Abdul Aziz bin Ibrahim to pay 50 per cent of the damages awarded.

SUPREME COURT.

Khoo Eng Jin (*J.S. Sandu* with him) for the appellant.

H.R. Sankey for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C. J. (Borneo) (delivering the Judgment of the Court): This appeal is concerned with the construction of section 80(1) of the Road Traffic Ordinance, 1958 (hereinafter referred to as the Ordinance) in respect of the duty of insurers to satisfy a judgment against persons insured by them.

The appellant was a pillion passenger on a motor vespa owned and ridden by one Abdul Aziz bin Ibrahim. On March 20, 1976, as a result of an accident between the motor vespa and a motor lorry owned by Tan Keng Wee and driven by Ng Pit Fei, the appellant was injured. He sued the three named persons in Civil Suit No. 103 of 1977. On June 9, 1982 judgment was given in his favour. The rider of the motor vespa and the driver of the motor lorry were held to be equally to blame for the accident. He sought to enforce the whole judgment sum against the respondent, the insurer. The motor vespa was covered by another insurance company which did not cover any pillion passenger.

In the statement of defence the respondent admitted being liable to one half of the judgment sum as liability was equally apportioned by the learned Judge. It is the contention of the appellant that on the principle of liability for several tortfeasors causing the same damage the rider of the motor vespa and the driver of the motor lorry are liable in law to the appellant for the full amount of the judgment.

In a very short judgment the learned Judge pointed out that the respondent had only insured the owner and the driver of the motor lorry but not the rider of the motor vespa. Consequently, he held that under section 80(1) of the Ordinance the respondent was only liable to any judgment obtained by a third party in respect of the motor lorry which was insured by them. He further held that the respondent was duty-bound to satisfy any judgment which the appellant obtained against the owner and the driver of the motor lorry but was not obliged to satisfy the judgment obtained against the rider of the motor vespa as the respondent had at no time covered the latter with any risk in respect of third party liability. He therefore held that the appellant could not enforce that part of the judgment against the respondent.

Encik Khoo Eng Jin for the appellant submitted that although liability was apportioned the learned Judge in Civil Suit No. 103 of 1977 left the judgment open to the appellant. Under the common law each joint tortfeasor is liable for the whole judgment. Thus, in *Oli Mohamed* v. *Keith Murphy & Anor.*[1] Choor Singh J. at page 245 observed:-

> "Counsel for the second defendant submitted that if the court holds that both defendants were equally negligent, then the judgment against the second defendant should be only for 50 per cent of the total sum assessed as damages in this case. In my opinion this submission also fails. It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage . . .".

Choor Singh J. also referred to the case of *Dingle* v. *Associated Newspapers Ltd. & Ors.*[2] when Devlin L.J. stated at page 188:–

> ". . . . Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings . . . . ".

In the instant appeal the appellant sought to enforce judgment by suing the respondent, the insurer of the owner and the driver of the motor lorry under section 80(1) of the Ordinance. The relevant part of section 80(1) reads:-

> "(1)If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the

policy *the insurer shall subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability*, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The appellant was a pillion passenger on the motor vespa and an innocent third party. The question is what sum is payable to the appellant. Section 75 specifies the requirements in respect of a policy of insurance. Liability refers to what is required to be covered by law under that section. It is the submission of Encik Khoo that the learned Judge was wrong in his interpretation of section 80(1) and that liability refers to 3rd party liability. The appellant is an innocent party and has obtained judgment against the rider of the motor vespa as well as the owner and the driver of the motor lorry. They were joint tortfeasors.

Encik H.R. Sankey for the respondent submitted that although the owner and the driver of the motor lorry are joint tortfeasors the rider of the motor vespa is not a joint tortfeasor with the owner and the driver of the motor lorry. He submitted that *Oli Mohamed's case*[1] was wrongly decided and that *Dingle's case*[2] was a libel case and the facts in the case of *Ahmad Nordin bin Haji Maslan & Anor.* v. *Eng Ngak Hua & Ors.*[3] were distinguishable.

In *Chan Kit Hong & Anor.* v. *Jayakumar & Anor.*[4] the first and the second respondents sued the appellants for negligence arising out of a collision between a motor car driven by the first respondent in which the second respondent was a passenger and a motor lorry driven by the first appellant. The appellants filed a notice of indemnity and contribution against the first respondent claiming to be entitled to contribution from any sum which the second respondent might recover from the appellants to the extent of the first respondent's liability. At the trial the parties by consent agreed on liability between the first respondent and the appellants, the first respondent was apportioned at 20% to blame. As for the second respondent the appellants admitted a 100% liability. In due course the appellants were ordered to pay $230,871.92 for general and special damages with interest and costs. The appellants concluded that they were liable to pay the second respondent only 80% of the total award and that the balance of 20% should be recovered by the second respondent direct from the first respondent. The learned Judge ruled against the appellants and they appealed. Dismissing the appeal the Federal Court held that the claim against the first respondent should have been by counterclaim.

The respondent submitted that the owner and the driver of the motor lorry were liable to 50% of the claim. The indemnity they got from the insurance company, that is, the respondent was only 50%. The appellant chose to sue the insurance company which would only give indemnity to the extent held by the court and covered by the policy of insurance.

We do not agree with the contention of the respondent that the rider of the motor vespa is not a joint tortfeasor with the driver of the motor lorry. Whether the driver is the servant or the agent of the owner of the motor lorry both the rider of the motor vespa and the driver of the motor lorry are clearly joint tortfeasors as both were directly involved in committing the wrongful act.

Coincidentally, in *Ahmad Nordin's case*[3] the appeal was heard by the same three Judges who are now dealing with the instant appeal. At page 436, Syed Agil Barakbah S.C.J., delivering the judgment of the Court stated:

> "In passing, we would like to confirm the view of the learned Judge that the dependants of the deceased, *viz.*, third to the eighth plaintiffs are entitled to the whole amount of damages although the liability has been apportioned between the first appellant and the first respondent. This conclusion is in accordance with the fundamental principle in the law of damages where the injuries committed on the plaintiff by more than one tortfeasor is one and indivisible. The principle is enunciated by Devlin, L.J. in *Dingle* v. *Associated Newspapers Ltd.* and adopted in *Oli Mohamed* v. *Keith Murphy & Anor.* dealing with a motor accident claim in Singapore ..."

Ahmad Nordin's case[3] can be distinguished from the present case in that there the first plaintiff was the driver of the motorcar which crashed into the back of the stationary motor lorry. The second plaintiff was a passenger occupying the rear seat and the other passenger occupying the front seat was killed. The third to the eighth plaintiffs were his widow, dependants and parents. We confirmed the stand taken by the trial Judge acting apparently under section 10(2) of the Civil Law Act, 1956 that only the third to the eighth plaintiffs were entitled to claim the whole of the damages against the defendants even though the trial Judge found the first plaintiff partly to blame for the tragic accident. No order was, however, made in favour of the first and the second plaintiffs.

In *Bankers & Traders Insurance Co. Ltd.* v. *National Insurance Co. Ltd.*[5] the Privy Council had to decide which of the two insurance companies was liable to satisfy the judgment obtained against the driver. In delivering the judgment of the Board Lord Scarman touched on section 80 of the Ordinance at page 402:

"Section 80 of the Ordinance imposes a duty upon insurers to satisfy judgments against persons insured in respect of third party risks ...."

He pointed out at page 403 that:

"An attempt was made before the Board by counsel for the owner's insurers to argue that in construing section 80(1) one must disregard the terms of the policy. The submission is flatly contradicted by the language of the subsection which expressly directs attention to the liability covered by 'the terms of the policy'. The Ordinance proceeds upon the basis of the terms of the policy, subject only to the specified exceptions and restrictions contained in sections 78 and 79 ....".

Looking at the wordings of section 80(1) of the Ordinance we cannot say that the learned Judge was wrong in his interpretation. The insurer is not bound by statute to pay the third party the judgment given in his favour but only "any sum payable thereunder." Moreover, the insurer does not appear to have to pay the costs of the proceedings but only "any sum payable in respect of costs". The same seems to apply to interest which is limited to "any sum payable in respect of interest". In our view, such a construction appears to find support in section 80(4) of the Ordinance which does not refer to the judgment given in favour of the third party but only "the amount which an insurer becomes liable under this section to pay . . . . ". In short, in our judgment, the insurer is under a duty to pay the amount which the insured person has been ordered by the trial court to pay the third party including the insured's share of the taxed costs and interest under the judgment.

In this case the trial Judge gave judgment in favour of the third party and apportioned the liability as well as the damages to be paid by the parties. Apparently, the trial Judge was acting under section 10(2) of the Civil Law Act, 1956 under which the court would have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. The trial Judge did not deem fit to exercise his discretion nor was he asked to do so on the facts of this case.

In our view, the word "liability" used in section 80(1) of the Ordinance means "liability covered by the term of the policy." Moreover, the right of the third party to enforce a judgment given against an insured person is a right given to him by statute and not under the common law. As such the right of the third party is subject to the terms and conditions of the insurance policy. (See *Austin* v. *Zurich General Accident and Liability Insurance Co. Ltd.*[6] and the relevant provisions of the statute, *viz.* section 80 of the Ordinance). It is also important that section 80 of the Ordinance should be interpreted subject to section 10(1) and (2) of the Civil Law Act, 1956 in order to bring it in harmony with the development of the law.

The learned Judge had considered the implication of section 80 of the Ordinance. He held that the policy only covered the owner and the driver of the motor lorry but not the rider of the motor vespa who was covered by another insurance. The insurer was only responsible to satisfy the judgment against the insured. The insurer was never under any risk in respect of the motor vespa within the terms and conditions of the policy at the time of the accident. So that the third party cannot expect the insurer to be liable for the judgment obtained against the rider of the motor vespa.

We have no reason to differ from the learned Judge in construing section 80(1) of the Ordinance. Accordingly, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Sandu & Co.; H.R. Sankey & Co.*

TEOH HOE CHYE v. PUBLIC PROSECUTOR
YEAP TEONG TEAN v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Seah & Abdoolcader S.C. JJ.) August 18 & September 18, 1986]

[Kuala Lumpur – Supreme Court Criminal Appeal Nos. 4 and 5 of 1986]

Criminal Law and Procedure – Charge of trafficking in dangerous drugs – Serious break in chain of evidence affecting proof of identity of exhibits – Failure to call witness giving rise to serious gap in prosecution case – Appeal allowed – Dangerous Drugs Act, 1952, s.39B(1) – Courts of Judicature Act, 1964, s.60(1).